SUPREME

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IN THE

Supreme Court of the United States

No. 246

MICHAEL VETERE, LEWIS HUMMEL and HERMAN ABRAMS,

Petitioners,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York; BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK; PATRICIA ANN MITCHELL, ET AL.; and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

REPLY BRIEF OF PETITIONERS

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The within brief is submitted in reply to the briefs submitted by the respondents, Commissioner of Education of the State of New York ("Commissioner"), and Patricia Ann Mitchell, et al. and The National Association for the Advancement of Colored People ("NAACP"), in opposition to the petition for a writ of certiorari.

ARGUMENT

I.

Unless this Court is prepared to countenance the compulsory ethnic dispersement of Jews, Catholics and others on a quota basis, the Commissioner's determination must be overturned.

The opposing briefs of both respondents proceed from the erroneous major premise that "good" racial assignment is quite legal, and is immune from judicial review as a purely local issue; whereas "bad" racial assignment is the only kind which justifies Federal intervention.

Fortunately or unfortunately, we are not without experience in observing the results of such reasoning; its dismal failure is written in broad strokes across the history of the southern United States.

It hardly needs to be added that the Commissioner's directive is in direct violation of the General Statement of Policies issued under Title VI of the Civil Rights Act of 1964, issued by the U.S. Department of Health, Education and Welfare in April, 1965. Such Statement, in Section V(C) thereof, reads in part as follows:

"2. INITIAL ASSIGNMENT. All pupils shall be initially assigned to the school for the geographic attendance zone in which they reside.

"3. ATTENDANCE OUTSIDE ZONE OF RESIDENCE. The rules or practices under which pupils are reassigned or permitted to transfer to a school outside their zone of residence shall not take race, color, or national origin into account.

"4. RIGHT TO ATTEND IN ZONE OF RESIDENCE. At the beginning of any school year any pupil attending a school outside his zone of residence shall have the right to transfer to and attend the school in his zone of residence."

It is of compelling importance to remember that the Commissioner's stated objective is to achieve in the classroom a "balancing" not only of the races, but of the ". . . economic, national, religious or racial background[s] . . ." of pupils in New York State. (Vol. I, pp. 140-141)[1]

Nor can the spectre of a statewide (or nationwide) system of racial, religious and socio-economic quotas be dismissed as a merely academic possibility. Already, the hue and cry for that very practice has commenced.[2] What happens now if a State official decides that too many Jews are living and going to school together—that they are not being properly "assimilated"? What happens if such a State official decides that Jewish children suffer an educational impairment by going to school with too many of their own kind? Or that the superior educational heritage of

[1] Unless otherwise indicated, parenthetical references are to volume and page numbers of the record.

[2] For example, as reported in the New York Times of February 8, 1965 (p. 34 col. 6) a prominent Protestant minister in New York City called for the imposition of racial quotas in housing, and in private as well as public schools. In particular, he attacked the "voluntary self-segregation of Roman Catholics in education and of various ethnic groups in residential patterns. . . ."

the Jews must be shared, by enforced educational association on a quota basis, with their culturally deprived Irish Catholic (or Swedish Protestant) brethren?

Would this Court, in such an event, countenance a "balancing" process whereby the Jews would be involuntarily dispersed throughout the educational community? If not, the Commissioner's present position must be overturned. For this is precisely the power which he has been granted by the Court below.

Nor is it relevant that the Commissioner claims to act from noble motives. His executive displacement of established law, even in the name of doing good, refers us to the dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438, at 479:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."

II.

Both respondents have conceded that the Commissioner's compulsory "balancing" of the races on a quota basis raises a substantial Federal question.[3]

The contention of the NAACP, that no Federal question exists, is belied by its own chief assertion before the New York State Court of Appeals in the present case:

[3] The controversy over this question continues in the lower Federal courts. Thus in *Wanner* v. *County School Board of Arlington County* (E.D. Va., Civ. No. 3630, decided August 6,

> "Boards of Education have a constitutional duty to eliminate racial imbalance." (See Appendix A to Petition for Certiorari, at page 25).

This is a far cry from what the NAACP told this Court in earlier cases bearing on the present question.

At the first argument of *Brown* v. *Board of Education* in 1952, Robert L. Carter, Esq., was asked by Mr. Justice Black, whether the Kansas Courts' finding, that the segregated Negro schools were not equal to the white schools, referred merely to the community in question, or was a more general finding. Mr. Carter answered:

> "I think I agree that the finding refers to Kansas and to these appellants and to Topeka. Of course, under our theory, you do not have to reach the findings, because we maintain that this is an unconstitutional classification". [21 U. S. Law Week 3163 (Dec. 16, 1952).]

Spotswood Robinson, Esq., in his part of the argument of the South Carolina and Virginia Desegregation decisions in 1953, stated that the purpose of the fourteenth amendment was to prevent the imposition of

> "governmentally cast distinctions, predicated upon race."
> [22 U. S. Law Week 3157 (Dec. 15, 1953).]

Thurgood Marshall, Esq., then summarized the argument of the plaintiffs stating:

1965), the court upheld contentions of White pupils based upon the Federal constitution and the Civil Rights Act of 1964: "The School Board may, if it be so advised, redraw the boundary lines for a school district without regard to race or color, so as to divide the pupils equitably among the existing junior high school buildings in the school system but it may not close an existing neighborhood school primarily for the purpose of mixing the races or creating a better racial balance in the other schools."

> "Our argument is that the state is deprived of any power to make any racial classification in any governmental field."
>
> [22 U. S. Law Week 3159 (Dec. 15, 1953).]

At the final argument of the desegregation decisions, in 1955, when the court was concerned only with the mandate ordering the end of segregation, Thurgood Marshall, Esq., stated:

> "[T]he only thing the court is dealing with is whether race can be used * * *
> What we want is a striking down of race * * *"
>
> [23 U. S. Law Week 3257 (Apr. 19, 1955).]

Similarly, the Commissioner has entertained an opposite view when he deemed it advantageous to do so.

In *Bell* v. *School District No. 6, Town of Babylon,* 77 State Dept. Rep. 37 at 38 (1956), the present New York State Commissioner considered the appeal of a Negro mother in which she contended that the location of a school within the "Negro" section of the school district would, by reason solely of the incidence of Negro population, result in an 80% Negro enrollment; and that such fact would constitute *de facto* segregation. The Commissioner rejected the appeal, stating:

> "Because of the incidence of location, the mere fact that the preponderance of the children who would normally attend the neighborhood school happened to be white or negro, of Polish, Irish, Scotch, Italian or English descent or otherwise or who espouse one religion or another, *does not require a board to attempt to gerrymander the lines, to assign but a certain percentage to a particular school. This would constitute as much discrimination as a gerrymandered line to accomplish the opposite effect.*" (Italics supplied)

It is noteworthy that the above decision was rendered by the Commissioner some two years after the decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). It is also worthy of note that the practice which the Commissioner condemned in his decision in *Bell*, is precisely the practice which he is performing in the present case. For in the present case, he has ordered the abolition of the boundary lines of three attendance areas for the sole purpose of achieving a so-called racial "balance" (Vol. I, pp. 106-116).

How, then, can the Commissioner contend that no Federal question exists in the present case?

May the Commissioner, within a short period of time, promulgate and enforce two exactly opposite policies on a question of such professed importance? And may he do so with complete immunity from judicial review, as he contends? If so, it is time to admit that we have a government not of laws, but of men.

Of course, the Commissioner would have this Court believe that his compulsory "balancing" of the races is being practiced only in the present case, where "unique" geographical factors allegedly exist.

In fact, the Commissioner's directive mandating a compulsive "balancing" of the races, was sent to every school district in New York State (Vol. I, p. 140). And the Commissioner has gone to court repeatedly, and has used the precedent of the present case to defend his imposition of racial quotas, in communities other than the one involved in the present case.

In White Plains, New York:

Cameron v. *Commissioner, et al* (unreported decision of the Supreme Court of Albany County, Index No. 5440/1964. Racial "balancing" in accordance with Commissioner's directive upheld).

In Roosevelt, New York:

Squitieri v. *Commissioner, et al* (unreported decision of the Supreme Court of Albany County, Index No. 2364/1964. Racial "balancing" in accordance with Commissioner's directive upheld).

Thus it is obvious that the Commissioner's plan of enrollment by racial quotas is intended to be employed on a statewide basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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